UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT CHESTNUT,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Civil No. 96-110-P-C***
	)	
GOVERNOR of the STATE	***)***	
of MAINE, et al.,	***)***	
	)	
Respondents	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The *pro se* petitioner filed this action as a purported "civil rights complaint" under 42 U.S.C. § 1983, seeking declaratory and injunctive relief prohibiting the state of Maine from extraditing him from the custody of the state of New York when he completes the sentence that he is currently serving there in order to complete serving the sentence imposed by the state of Maine before his escape from a Maine prison and his conviction for crimes subsequently committed in New York. The petitioner believes that he is entitled to this relief -- essentially a cancellation of the remainder of his Maine sentence -- because the state wrongfully refused to accept custody of him when his New York sentence was imposed to run concurrently with the existing Maine sentence, "if permitted." He bases his claim on alleged violations of the constitutional guarantees of due process of law and equal protection of the laws. On the respondents' motion, the court held that the complaint is more properly construed as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, *see* Docket

No. 7, and this matter has proceeded on that basis.[1] The petitioner has moved for reconsideration of this ruling (Docket Nos. 8 and 14), for appointment of counsel (Docket No. 9), for sanctions (Docket No. 14) and to "convert" the petition into a proceeding under 42 U.S.C. § 1983 and then to dismiss the same without prejudice (Docket No. 15). The respondents have moved for permission to include additional documents in their answer. Docket No. 16. For the reasons that follow, I grant the respondents' motion, deny the petitioner's motions and recommend that the court deny the habeas corpus petition.

I. Background

On or about April 13, 1990 the petitioner pled guilty to charges of burglary (Class B), theft (Class B), theft (Class E), theft (Class C) and escape (Class C), in the Maine Superior Court, Hancock County, and was sentenced to concurrent terms, the longest of which was eight years. Judgment and Commitment, Docket No. CR-89-45, attached to Petitioner's Motion for Recusal (Docket No. 11). On September 14, 1991 the petitioner escaped from the custody of the state of Maine. Complaint ¶ 7 (Docket No. 2).

On June 23, 1992 the County Court of Orange County, New York, sentenced the petitioner to two consecutive sentences of 3 1/2 to 7 years and 2 to 4 years. Memorandum of Decision dated August 9, 1994 ("August 1994 Decision") at 2, *People v. Chestnut*, New York Supreme Court, Sullivan County, RJI No. 52-11493-94, attachment to Motion to Include Additional Documents in the State's Answer ("State's Motion") (Docket No. 16). On March 5, 1993 the petitioner was

[1] While the petitioner is not currently in custody pursuant to the judgment of a court in Maine, the impending threat of incarceration pursuant to such a judgment renders him "in custody" for purposes of a habeas corpus petition. *See Katz v. King*, 627 F.2d 568, 573 (1st Cir. 1980) (petitioner whose incarceration has been stayed pending appeal is "in custody" for purposes of habeas corpus petition).

sentenced to two to four years of imprisonment by the County Court of Westchester County, New York to be served concurrently with the Orange County sentence. *Id*. On April 27, 1993 the petitioner pled guilty in the Supreme Court of Sullivan County, New York, to two counts of burglary and two counts of grand larceny, for which he was sentenced pursuant to a plea agreement to concurrent terms of 6 to 12 years and 3 1/2 to 7 years, to run concurrently with the Orange and Westchester County sentences. *Id*. The Sullivan County sentence also provided: "If permitted [the Sullivan County sentence] will also run concurrent with a sentence from the State of Maine." Sentence and Commitment, *People v. Chestnut*, Sullivan County, Indictment # 237-91 (4/27/93), Exhibit A(a) to the petitioner's Memorandum of Law (Docket No. 2).

In Maine, on July 1, 1993, the petitioner was convicted of escape (Class C) and sentenced to two years imprisonment. Joint Stipulation of Facts ("Joint Stipulation") ¶ 9, *Chestnut v. State of Maine*, Superior Court, Hancock County, Docket No. CR-93-115, attached to Answer to Petition for Writ of Habeas Corpus (Docket No. 10). On September 24, 1993 he was convicted of two counts of burglary (Class C) and was sentenced to two years imprisonment.[2] *Id*. ¶ 10. The petitioner was returned to the custody of the state of New York on September 29, 1993. *Id*. ¶ 11.

After the New York sentencing, the petitioner moved for modification of his sentence on the ground that he should have been returned to Maine instead of incarcerated in New York. August 1994 Decision at 3. This motion was granted on June 3, 1994. *Id.* at 3-4. The order states that the petitioner will be made available "for execution of an outstanding sentence detainer from the State

[2] The petitioner concedes that he must serve the 1993 Maine sentences consecutively with his New York sentences, and those Maine sentences are thus not at issue in this proceeding. Letter dated July 16, 1996 from the petitioner to Joseph A. Wannemacher, Assistant Attorney General (Docket No. 12) at [3].

of Maine" and that the New York sentence "shall commence upon defendant's receipt by the appropriate authorities of the State of Maine." Order to Produce, *People v. Chestnut*, Indictment # 237-91, Supreme Court, Sullivan County, Exhibit A(b) to the petitioner's Memorandum of Law (Docket No. 2). By letter dated July 18, 1994 the state of Maine declined to accept transfer of the petitioner. Letter of Diane Sleek, Assistant Attorney General, to Elissa Killian, Assistant District Attorney, Exhibit B to the petitioner's Memorandum of Law (Docket No. 2).

The People moved for reargument of the petitioner's motion, and the Sullivan County court granted this motion, vacating its June 3, 1994 decision on August 9, 1994. August 1994 Decision at 4. The court found that the combination of the Orange County sentence, which runs consecutively with the earlier Maine sentence, with the Maine sentence exceeded the term of the Sullivan County sentence, making the Orange County sentence the governing sentence for the purposes of New York law governing incarceration. Thus, the Sullivan sentence "merges into and is satisfied by the discharge of the aggregate maximum term of the Orange and Maine sentences. The defendant is thus properly in the custody of the New York State Department of Correctional Services." *Id*. at 6. The order executing this decision provides "that pursuant to New York Penal Law Section 70.20(1) and (3) the defendant is properly in the custody of the New York State Department of Correction and shall remain in said custody until completion and discharge from the New York State sentences and upon discharge from the New York State sentences shall be returned to the State of Maine Department of Corrections pursuant to the applicable law." Order, *People v. Chestnut*, Supreme Court, Sullivan County, RJI No. 52-11493-94 (August 17, 1994), attached to State's Motion. The petitioner's application to appeal from this order was denied on November 22, 1994. Order (Mercure, J.), *People v. Chestnut*, attached to State's Motion.

II. Analysis

A. Motion for Reconsideration

The petitioner argues that he is requesting relief in the nature of mandamus and that he does not seek to shorten the length of his incarceration but rather to prevent the impermissible lengthening of that incarceration. Motion for Reconsideration (Docket No. 8) at 1, 2. He asserts that this relief "would not necessarily imply that the underlying conviction or sentence is invalid." *Id*. at 2. The respondents correctly note that the petitioner is not complaining about the conditions of his confinement. Letter Motion (Docket No. 6) at 1.

The relevant statute is 28 U.S.C. § 2254(a), which provides in full: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Here, the petitioner is concerned with his impending reincarceration by the state of Maine, and he is clearly alleging that, were he to be returned to Maine to serve out the sentence that was interrupted by his escape after completion of his New York sentence, he would be in custody in violation of the U. S. Constitution. Complaint, ¶¶ 18, 19. Thus, it is apparent that the statute does apply to his claims. When a prisoner raises a constitutional challenge to the fact or length of his custody, and the relief he seeks is a determination that he is entitled to a speedier release from that confinement, habeas corpus is the exclusive federal remedy available. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). The petitioner's motions for reconsideration must be denied.

B. Motion for Appointment of Counsel

A petitioner for habeas corpus relief may request appointment of counsel if he is financially

eligible. Counsel will be appointed if the court determines that the interests of justice so require. 18 U.S.C. § 3006A(a)(2)(B). If an evidentiary hearing on the petition is to be conducted, counsel must be appointed. Rule 8(c), Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"). If, as is the case here, no evidentiary hearing is necessary, the appointment of counsel is discretionary. *Abdullah v. Norris*, 18 F.3d 571, 573 (8th Cir.), *cert. denied* 115 S.Ct. 163 (1994).

Assuming for purposes of this motion that the petitioner's claims are not frivolous, *see* Habeas Rule 4, the interests of justice require this court to consider the legal complexity of the case, the factual complexity of the case, the petitioner's ability to investigate and present his claim, and any other relevant factors, *Abdullah*, 18 F.3d at 573. Claims of denial of due process and equal protection in this context are not legally complex. *Id*. The factual issues are not at all complex. The petitioner's complaint, as well as his subsequent motions and submissions, demonstrate that he understands the issues and is capable of presenting his claims. *Hoggard v. Purkett*, 29 F.3d 469, 471 (8th Cir. 1994); *Abdullah*, 18 F.3d at 574. Therefore, the interests of justice do not require the appointment of counsel in this case. *See generally United States v. Mala*, 7 F.3d 1058, 1064 (1st Cir. 1993), *cert. denied* 114 S.Ct. 1839 (1994) (interests of justice rarely warrant appointment of counsel in section 2255 cases, also governed by 18 U.S.C. § 3006A(a)(2)(B)).

C. Motion for Sanctions

Asserting that counsel for the respondents has misrepresented facts to this court, misled the court, and "play[ed] with words to the point where it's bordering on PERJURY," Motion for Sanctions (Docket No. 14) at [2], the petitioner asks this court to impose an appropriate sanction

pursuant to Fed. R. Civ. P. 11. Contrary to the petitioner's conclusory allegations, there is nothing in the materials submitted by respondents' counsel that even begins to justify invocation of the sanctions available under Rule 11(c). Indeed, the only attempt to mislead the court apparent on the record of this proceeding is that of the petitioner, who bases his argument on the June 1994 order of the New York Supreme Court, Sullivan County, without revealing that that order was vacated on August 17, 1994, long before he filed this action. The motion for sanctions must be denied.

D. Motion to Convert and Dismiss without Prejudice

The petitioner requests this court, if it denies his motion for reconsideration, to "convert[] . . . [the action] back to a Civil Rights Complaint for the purpose of dismissing it for failing to state a cause of action," apparently so that he may bring an action in state court raising the same claims. Motion to Convert and Dismiss Without Prejudice (Docket No. 15) at 1-2. For the reasons stated above in my analysis of the petitioner's Motion for Reconsideration, this is not a civil rights action. The court cannot allow the petitioner to convert his petition into something that it is not in order to preserve his ability to proceed in another forum. The petitioner cites no authority for this request, and my research has revealed none. This motion must also be denied.

E. Respondents' Motion to Include Additional Documents in the State's Answer

The respondents moved, on August 9, 1996, approximately one month after filing their response to the petition, to include in their answer, or otherwise to make part of the record, the following documents, assertedly "recently received from New York:" the August 9, 1994 decision of Judge Williams in Sullivan County reversing his June 3, 1994 order that the petitioner be returned

to Maine; the August 17, 1994 order carrying out the August decision; the petitioner's motion for permission to appeal the August decision; the opposition of the Sullivan County District Attorney to the motion for permission to appeal; and the denial of permission to appeal by the Appellate Division of the New York Supreme Court. Docket No. 16. The petitioner did not object to this motion. *See* Local Rule 19(c) (party not filing objection to motion within 10 days after filing of motion deemed to have waived objection).

Habeas Rule 7(a) permits the court to direct that the record be expanded by the parties "by the inclusion of additional materials relevant to the determination of the merits of the petition." *See Raines v. United States*, 423 F.2d 526, 529-30 (4th Cir. 1970). Here, the August 1994 decision of Judge Williams vacating his June 1994 decision upon which the petitioner relies for his constitutional claim is highly relevant to the determination of the merits of the petitioner's claims. The existence of this determinative information, while a matter of public record, might not otherwise have come to the court's attention. Construing the respondents' motion as one asking the court to direct that the record be expanded, the motion must be granted and the materials attached to the motion included in the record of this proceeding. The respondents' submission to the court and to the petitioner of copies of these documents on August 9, 1996 complied with Habeas Rule 7(c) and allowed the petitioner an opportunity to admit or deny their correctness.

F. The Merits

The petitioner's claim is based on an argument that the sentence imposed by Judge Williams in the Sullivan County case, as the result of his plea bargain, must by its terms run concurrently with the 1990 Maine sentence and that Maine's refusal to accept him in response to the June 1994 order

making him available for transfer in light of that sentence deprived him of constitutional rights. That refusal occurred on July 18, 1994, over one month after the district attorney had requested reargument on the motion that led to the June 1994 order. August 1994 Decision at 4. After entertaining reargument, Judge Williams indicated on August 9, 1994 that he would vacate his June 1994 order, and on August 17, 1994 he did so. Judge Williams ruled at that time that the Sullivan County sentence, which he had imposed, was merged by operation of New York law into the petitioner's Orange County sentence. The Orange County sentence, again by operation of New York law, is consecutive with the 1990 Maine sentence, not concurrent. Thus, the intent of the New York courts is currently being carried out by the petitioner's incarceration in New York, with the 1990 Maine sentence to resume after the New York sentence is completed. There is no basis in law or fact for the petitioner to claim that Maine should have accepted custody so that his Maine and New York sentences could run concurrently.[3]

It is therefore unnecessary to consider the respondents' arguments concerning exhaustion of state law remedies and waiver.

III. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DENIED** without a hearing.

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[3] If the June 1994 order of the New York court had not been vacated, the petitioner would most likely not have succeeded on his claim in any event. Both *Braun v. Rhay*, 416 F.2d 1055, 1057 (9th Cir. 1969), and *Breeden v. New Jersey Dep't of Corrections*, 625 A.2d 1125, 1129-31 (1993), address factual situations virtually identical to that presented here. In neither case was the prisoner successful, and I find the courts' reasoning to be persuasive.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 9th day of January, 1997.

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David M. Cohen
United States Magistrate Judge